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5 **UNITED STATES DISTRICT COURT**  
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7 **DISTRICT OF NEVADA**

8 JOSE GAXIOLA, )  
9 Petitioner, ) 3:06-cv-0516-RCJ-RAM  
10 vs. )  
11 JACK PALMER, *et al.*, )  
12 Respondents. )  
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15 This action is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by pro  
16 se petitioner Jose Gaxiola, a Nevada prisoner. The matter was stayed to allow petitioner to return to  
17 state court to exhaust grounds 2, 4, and 5 of his petition. He has now moved to reopen the case and  
18 respondents have filed a motion to dismiss these grounds on the basis of a procedural bar (docket  
19 #24). Petitioner has opposed the motion (docket #26) and moves for a extension of his prison  
20 copywork limit (docket #27).

21 **I. Procedural History**

22 On June 20, 2003, after a jury trial, petitioner was convicted of five counts of sexual  
23 assault with a minor under the age of fourteen (counts I-V) and two counts of lewdness with a child  
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1 under the age of fourteen (counts VI-VII). Petitioner's Exhibit A.<sup>1</sup> The District Court for Clark  
 2 County sentenced petitioner to life imprisonment with the possibility of parole after twenty years for  
 3 counts I-V, with the sentences for counts II-V to run concurrently to count I, and to life  
 4 imprisonment with the possibility of parole after ten years for counts VI-VII, with count VII to run  
 5 consecutively to count I. *Id.* The court entered a judgment of conviction on September 25, 2003.  
 6 *Id.*

7 After having completed a full round of state court appellate and post-conviction  
 8 proceedings, petitioner mailed his federal habeas corpus petition on September 27, 2006 (docket #1).  
 9 Respondents moved to dismiss the petition, alleging several grounds contained in the petition are  
 10 unexhausted because they had not been presented as federal violations, and one ground fails to state  
 11 a claim for federal habeas corpus relief (docket #11). Petitioner opposed the motion to dismiss  
 12 (docket #12) and the court determined that grounds two, four and five were unexhausted. The court  
 13 allowed petitioner to return to the state courts to exhaust his claims and petitioner relies upon his  
 14 original petition as fully exhausted.

15 In moving to dismiss grounds two, four and five, respondents note that the state  
 16 courts denied petitioner relief on his most recent state petition on the basis of state procedural laws.  
 17 Respondents renew their argument that ground six of the petition fails to state a claim. This  
 18 argument was rejected by the court previously and will not be reconsidered here.

19 **II. Motion to Dismiss**

20 **A. Procedural Bar**

21 The doctrine of procedural default generally prohibits a federal court from considering a  
 22 specific habeas ground where the state's highest court declined to reach the merits of that claim on  
 23 procedural grounds. *See Murray v. Carrier*, 477 U.S. 478 (1986); *Engle v. Isaac*, 456 U.S. 107  
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25 <sup>1</sup> The exhibits cited in this order in the form "Exhibit \_\_\_\_," are those filed by respondents in  
 26 support of their motion to dismiss, and are located in the record at docket #10. The exhibits cited in this  
 order in the form "Petitioner's Exhibit \_\_\_\_," are those filed by petitioner in support of his habeas  
 petition, and are located in the record at docket #1.

1 (1982). In all cases in which a state prisoner has defaulted his federal claims in state court pursuant  
 2 to an independent and adequate state procedural rule, federal habeas review is barred unless he can  
 3 demonstrate cause for the default, and actual prejudice, or demonstrate that the failure to consider  
 4 the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722,  
 5 750(1991). Before a federal court finds procedural default, it must determine that the state court  
 6 explicitly invoked a state procedural bar as a separate basis for its decision. *Id.* at 729-30;  
 7 *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir.1995), cert. denied, 517 U.S. 1150 (1996). The  
 8 state rule cited must be "clear, consistently applied, and well-established at the time of the  
 9 petitioner's purported default." *Calderon v. United States Dist. Court for the E. Dist. of Cal.*, 96  
 10 F.3d 1126, 1129 (9th Cir.1996).

11                   In petitioner's second claim for relief he alleges that the trial court improperly gave a  
 12 jury instruction stating that no corroboration of the victim's testimony was needed to convict him of  
 13 sexual assault, in violation of his Fifth, Sixth and Fourteenth Amendment rights to due process, a fair  
 14 trial and confrontation.

15                   Petitioner alleges in his fourth claim that his Fifth, Sixth and Fourteenth Amendment  
 16 rights to due process, a fair trial and confrontation were violated by the trial court's admittance and  
 17 then striking of prior bad act evidence.

18                   Petitioner argues in his fifth ground for relief that the trial court violated his Fifth,  
 19 Sixth and Fourteenth Amendment rights to due process, a fair trial, and confrontation when it refused  
 20 to order a psychological evaluation of the victim.

21                   In response to petitioner's federalized claims in his second turn through state court,  
 22 relief was denied on the bases of Nevada law. Motion to Reopen (docket # 20), p. 21-23.  
 23 Specifically, the Nevada Supreme Court affirmed the state district court's determination that the  
 24 petition was untimely filed under NRS 34.726(1) and successive under NRS 34.810. These Nevada  
 25 statutes have been found to be consistently applied and sufficient to bar this court's review of the  
 26 claims. *Loveland v. Hatcher*, 231 F.3d 640 (9th Cir.2000); *Moran v. McDaniel*, 80 F.3d 1261, 1269

1 -1270 (9th Cir. 1996).

2           Having determined that petitioner suffered procedural default on grounds two, four  
 3 and five, our review of these claims are foreclosed unless petitioner can satisfy one of two tests: to  
 4 overcome procedural default, Petitioner must establish either (1) “cause for the default and prejudice  
 5 attributable thereto,” or (2) “that failure to consider [his defaulted] claim[s] will result in a  
 6 fundamental miscarriage of justice.” *Harris v. Reed*, 489 U.S. 255, 262 (1989) (*citations omitted*).

7           Petitioner opposes dismissal arguing his youth and ignorance of the law has prevented  
 8 him from successfully exhausting his federal claims. Unfortunately for petitioner, his argument are  
 9 unavailing. Cause to overcome a procedural bar must be some impediment external to the defense -  
 10 that is to say, so roadblock apart from himself or his legal counsel which actually prevented him  
 11 from knowing of or presenting to the state court the basis of his claims. Because petitioner raised the  
 12 factual bases of his claims to the state courts in his original appeal and post-conviction proceedings,  
 13 albeit as state law claims, he has not shown any good reason why those claims could not have been  
 14 presented in their federal guise.

15           A petitioner might overcome a procedural bar by demonstrating that dismissal of his  
 16 he is actually innocent of the charges. *Schlep v. Delo*, 513 U.S. 298 (1995). To make a showing of  
 17 actual innocence, petitioner must present new and compelling evidence of that fact. *See Smith v.*  
 18 *Murray*, 477 U.S. 527, 537 (1986) (*citing Murray v. Carrier*, 477 U.S. at 496); *see also Engle*, 456  
 19 U.S. at 134-35. Petitioner has not made such a showing. He merely notes that he has consistently  
 20 denied any role in the “apparent crimes. . . .” Opposition to Motion to Dismiss, p. 4. Such assertions  
 21 are insufficient to meet the standard under *Schlep* and *Smith, supra*. As a result, grounds two, four,  
 22 and five of the petition must be dismissed with prejudice.

23 **III. Motion for Copywork**

24           Petitioner’s motion for copywork for the sole purpose of completing this habeas  
 25 corpus action shall be granted. Prison officials shall be directed to allow petitioner to accrue  
 26 indebtedness in excess of the \$100 limit for purposes of completing the litigation of this federal

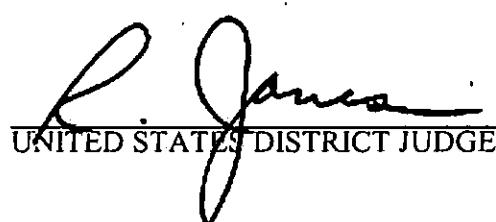
1 habeas action.

2                   **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (docket #24)  
3 is **GRANTED IN PART AND DENIED IN PART**. The court finds that grounds two, four and  
4 five are procedurally barred. Those grounds are **dismissed with prejudice**. Ground six shall not be  
5 dismissed.

6                   **IT IS FURTHER ORDERED** that respondents shall have thirty days from entry of  
7 this order to file their response to the surviving claims in the petition. Thereafter, petitioner shall  
8 have thirty days to file his reply.

9                   **IT IS FURTHER ORDERED** that petitioner's motion to extend copywork limit  
10 (docket #27) is **GRANTED**. Petitioner shall be permitted to obtain copies necessary to complete the  
11 litigation of this federal habeas action.

12                   DATED this 27th day of December 2010.

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15                   UNITED STATES DISTRICT JUDGE  
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